

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

**ARLENE T. PARKER, Individually and as)
the Administrator of the Estate of)
JOSEPH A. PARKER, Deceased, and)
ERIC GAINES, a minor, by his parent and)
natural guardian, ARLENE T. PARKER)
and JARMAR ROANE, a minor, by his)
parent and natural guardian, ARLENE T.)
PARKER,)**

Plaintiffs,

v.

**HOWARD WILK, M.D. and)
ST. FRANCIS HOSPITAL, INC.,)**

Defendants.

CA No. 98C-12-075-JEB

Submitted: January 12, 2006

Decided: February 13, 2006

OPINION

*Upon Defendant Howard Wilk's Motion for Summary Judgment.
Granted.*

Appearances:

F. Phillip Renzulli, Esquire, Marks, Feiner & Fridkin, P.C., Wilmington, Delaware.
Attorney for Plaintiffs.

Mason E. Turner, Esquire, Prickett Jones & Elliott, Wilmington, Delaware.
Attorney for Defendant Howard Wilk, M.D..

JOHN E. BABIARZ, JR., JUDGE.

In this medical malpractice suit, Defendant Howard Wilk, M.D., has moved for summary judgment on grounds that the testimony of Plaintiffs' medical expert is inadequate to meet the requirements for a claim of loss of chance to survive. The case arises from a ventral hernia and a subsequent exploratory laparotomy performed on decedent Joseph Parker by Defendant Wilk in January 1997. Mr. Parker died five days after the exploratory surgery while still a patient in St. Francis Hospital. The autopsy showed that the cause of death was a bilateral pulmonary embolism with obesity and cardiomegaly as contributing factors.

Plaintiffs filed a wrongful death claim and a survival claim based on loss of chance against Dr. Wilk and St. Francis Hospital. This Court granted the Hospital's motion for summary judgment on the wrongful death claim as to both defendants,¹ and subsequently granted the Hospital's motion for summary judgment on the loss of chance claim.² Dr. Wilk now moves for summary judgment on grounds that Plaintiffs' expert medical testimony cannot reliably establish causation and damages for Mr. Parker's lost chance to survive.

In an earlier decision in this case, this Court held that to prevail on a loss of chance claim, a plaintiff must show by a preponderance of the evidence that the

¹*Parker v. Wilk*, 2002 WL 555063 (Del. Super.).

²*Parker v. Wilk*, 2003 WL 21221895 (Del. Super.).

defendant's negligence reduced his chance of either survival or a better recovery. Once causation is established, a plaintiff must show damages by establishing the value of the lost chance.³

This decision pertains to the admissibility of the third deposition of Plaintiffs' expert witness, Dr. Lloyd Bergner, in which the doctor assigned a percentage to Mr. Parker's lost chance to survive. Bergner stated that based on what was not done, Mr. Parker's chance of survival was less than 10 percent.⁴ He also stated that if everything had been done in conformity with nationwide medical standards, Mr. Parker's chance of survival would have been greater than 90 percent.⁵ These percentages refer to the alleged negligence of both Dr. Wilk and St. Francis Hospital. They are based on Dr. Bergner's review of the decedent's medical records and the "world literature."⁶

Defendant Wilk argues that Dr. Bergner's opinion as to the percentage of lost chance does not meet the requirements for expert testimony set forth in D.R.E. 702. He also argues that Bergner's testimony cannot be used to establish causation because

³*Id.*

⁴Bergner Deposition (July 1, 2003) at 8.

⁵*Id.*

⁶*Id.* at 10-11.

it does not distinguish between the alleged negligence of Dr. Wilk and that of St. Francis Hospital.

Under D.R.E. 702, opinion testimony of an expert witness must be the product of reliable principles, and the expert must testify that he applied the principles and methods reliably to the facts of the case. The trial judge must determine whether the evidence is both relevant and reliable.⁷ Although there are many possible factors to be considered in this analysis, the Court should address only the factors that pertain to the facts of the case at bar.⁸ The inquiry should focus on actual principles and methodology, not on conclusions.⁹

In this case, Plaintiffs' expert has not provided any scientific basis for his opinion regarding the percent of decedent's loss of chance. He has not explained his conclusions in terms of either principles or methodology. He simply states his opinions as facts based on unidentified world literature. There is no scientific foundation for this testimony, and it does not meet the requirements of D.R.E 702.

Despite the specific percentages provided in his third deposition, Dr. Bergner repeatedly stated in his second deposition that he was unable to assign percentages

⁷*Bowen v. E.I. Du Pont de Nemours and Co.*, 2005 WL 1952859 at *8 (Del. Super.) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 519 (1993)).

⁸*Id.*

⁹*Id.* at *9.

to the loss of chance.¹⁰ Nor did he do so in his supporting affidavit, in which he averred that defendants' conduct resulted in a loss of chance but did not say that it was the probable cause of Mr. Parker's death. This too is at odds with Dr. Bergner's current opinion that Mr. Parker's chance of survival was reduced from more than 90 percent to less than 10 percent. Dr. Bergner's testimony is inherently contradictory and unreliable. The testimony also fails to provide any way of apportioning negligence to Dr. Wilk, as opposed to St. Francis, and therefore would not be of assistance to a jury in determining causation.

The Court concludes that Dr. Bergner's third deposition is scientifically unreliable and inadmissible under D.R.E. 702. Without reliable expert medical testimony as to causation, Plaintiffs cannot prevail,¹¹ and Defendant Wilk's motion for summary judgment is therefore ***Granted***.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEB,jr/ram/bjw
Original to Prothonotary

¹⁰Bergner Deposition (July 19, 2002) at 14, 20-21, 31, 36, 39, 42.

¹¹DEL. CODE ANN. tit. 18, § 6853.